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No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JORGE ALBERTO INNOCENCIO,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED FOR REVIEW

1. Since the district court found petitioner **read the consent form**, both courts below clearly erred in their factual determination that since petitioner **never read that consent form**, he could not have relied on its mistaken translation.

2. The courts below erred in **shifting to petitioner** the burden to prove involuntary was the alleged oral consent.

3. The courts below erred in **lessening** the government's burden of proving the fact of alleged oral consent.

4. With officers' relying only on an invalidly translated written consent to search, the courts below erred in upholding the search's validity based on an alleged **contemporaneous** oral consent.

PARTIES BELOW

At the appeals and district courts, all the parties were: Jorge Alberto Innocencio (**or** Inocencio), Pedro Elizondo Garza, Homero Hinojosa Garcia, Oziel Alanis, David Tovar and the United States of America.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner Jorge Alberto Innocencio, Jr., prays a writ of certiorari issue to review the judgment and opinion below.

OPINIONS BELOW

The unpublished opinion of the U. S. court of appeals appears at pages 1 to 15 of this petition's appendix (Pet.App. 1-15). For the judgment of the U.S. district court, see Pet.App. 18-29. For the district court's findings of facts and conclusions of law, see Pet.App. 30-54.

BASIS FOR SUPREME COURT'S JURISDICTION

On July 16, 1997, the court of appeals entered its judgment and opinion in the direct appeal of this criminal case. On August 13, 1997, the court of appeals denied a timely petition for panel rehearing (Pet.App. 16 [after 16, see faxed copy]. Petitioner sought no extension of time to file this petition.

Undersigned counsel was not involved in this case at the court of appeals and only learned by phone conversation with a deputy clerk at the court of appeals **on November 14, 1997**, that the court of appeals denied the rehearing motion on August 13, 1997. Previously undersigned counsel only had a copy of the mandate issued by the court of appeals in this case on August 22, 1997, and was working on the incorrect assumption this petition for certiorari was due to be filed on **November 20, 1997**, which is the 90th day after August 22, 1997. Then on **November 19, 1997**, undersigned first received from the deputy clerk a faxed copy of the court of appeals order denying the petition for rehearing on August 13, 1997 (Pet.App. 16).

Petitioner believes 28 U.S.C. 1254(1) confers on this Court jurisdiction to review on a writ of certiorari the judgment in question.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Jurisdiction in the U.S. district court was conferred under 18 U.S.C. 3231.

On February 22, 1995, a grand jury Indicted Innocencio in the Houston division of the southern district of Texas. On August 17, 1995, a jury found Innocencio guilty of the offenses charged in counts one, two and four of the indictment. **Count one** alleged Innocencio and others knowingly and intentionally conspired, confederated and agreed with others known and unknown to commit the following offense against the U.S., to wit: to possess with intent to distribute in excess of five kilograms of cocaine, a Schedule II controlled substance in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) and 21 U.S.C. 846. **Count two** alleged Innocencio and others aided and abetted persons known and unknown to knowingly and intentionally possess with intent to distribute in excess of five kilograms of cocaine, a Schedule II controlled substance in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) and 18 U.S.C. 2. **Count four** alleged Innocencio and others intentionally combined, conspired, confederated and agreed with each other and with

other persons known and unknown to commit the following offense against the U.S. in violation of 18 U.S.C. 1956, to wit: to knowingly and willfully attempt to conduct, conduct, and cause to be conducted a financial transaction, the activities of which affect interstate and foreign commerce with the proceeds of a specified unlawful activity, that is, drug trafficking, with the intent to promote the carrying on of said specified unlawful activity and knowing that the funds represented the proceeds of some form of unlawful activity, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and 1956(g).

On July 18, 1995, the district court entered findings of fact and conclusions of law [FFCL] on the suppression motions of this case's five defendants (Pet.App. 31-54).

On December 15, 1995, the district court sentenced Innocencio to concurrent 365 month-terms of imprisonment under counts one and two, and an additional concurrent 240 month-term of imprisonment under count four. The district court also sentenced Innocencio to a special assessment of $150.00 and terms of supervised release both of five years as to counts one and two and of three years on count 4.

It was the government's contention, throughout the course of the case in its documents filed in the trial court in this cause, that Innocencio **read** the consent form. (Record on Appeal Tab 80, U.S. Supplemental Response to Motion to Suppress, p. 9; Record on Appeal Tab 91, Govt's Proposed Findings of Fact and Conclusions of Law, p. 9; Record on Appeal Tab 97, Govt's Amended Proposed Findings of Fact and Conclusions of Law, p. 9; and Record on Appeal Tab 114, Govt's Trial Memorandum, p. 9).

The record supports Innocencio's contention that he understood Officer Bell orally requesting permission to question him. Officer Bell, from the beginning, **informed Innocencio he wanted to question him**.

Q What happened next?

A I explained to Mr. Inocencio that we were conducting an investigation, and I asked if he would perhaps help us or give us some answers to the investigation that we had.

Q Did you tell him what kind of investigation you were conducting?

A I told him it was a narcotics investigation. I asked if we could go inside his house where he could continue the investigation inside, and he said yes. (Suppress Hearing 1R 137, line 21 -- 137, line 4)

Q Okay. What happened at the dining room table?

A At the dining room table, I talked to Mr. Inocencio and I told him that we were conducting an investigation involving a black Camaro which we had seen at a hotel, at the Days Inn earlier in the day. And I asked him if he knew anyone who drove a black Camaro or who was staying at the Days Inn that he might be able to help us with that investigation. (Suppress Hearing 1R 137, lines 10-17)

Innocencio often testified he understood Officer Bell's requesting **consent to question** him inside the house on the investigation, without **consent to search** the house.

Q After you felt you were arrested by this officer, did you have an occasion to speak with an officer who testified the last time we were here, on friday? Officer Ted Bell?

A Yes, sir.

Q Was that conversation in English or in Spanish?

A In Spanish.

Q Did you understand the conversations you were having with him?

A Yes. He told me that he was going to ask me some questions. (Suppress Hearing 2R 11, lines 1-10)

Q During this questioning by officer bell, did he at any time request for your permission to search your house?

A No, sir.

Q Did you ever understand him to want to search your house?

A No, sir.

Q Did you understand everything he was telling you?

A Well, some of the things.

Q What do you mean, some of the things?

A Well, because he doesn't speak very good English.

Q English?

A I mean Spanish. (Suppress Hearing 2R 12, lines 20 -- 13)

Q Now when you signed this instrument, did you think you were giving consent to search your house?

A No, sir.

Q What is it that you thought you were acquiescing to?

A Only that they were investigating my person, asking me questions. (Suppress Hearing 2R 14, lines 25 -- 15, line 5)

Q Okay. And what did you understand was going to happen to you when you signed this document?

A Well, they was only to ask me questions.

Q And how did you determine that?

A Because there where--my name is right above. It says "person," and that's what I understood.

Q Is that what officer bell had told you, that you were going to be questioned if you signed it?

A Yes, Sir. (Suppress Hearing 2R 15, line 22 -- 16, line 5)

THE COURT: What is the word you would use for "search".

THE WITNESS: Catear.

THE COURT: How do you spell it?

THE INTERPRETER: C-A-T-E-A-R.

THE COURT: Okay. Go on.

BY MR. PEREZ:

Q Were those words ever used by Officer Ted Bell?

A No, sir. (Suppress Hearing 2R 17, lines 10-19)

Q And up until that point, you and he were communicating pretty well in Spanish, right?

A Yes, we were having a conversation in Spanish.

Q You understood what he told you, and you felt that he understood what you were telling him, right?

A Well, many words I did not understand. (Suppress Hearing 2R 28, lines 19-24)

Q Sir, isn't it true that the whole gist of you and Officer Bell's conversation in the driveway and inside your house, before the cocaine was found, was whether Officer Bell could search your house?

A No. He never told me that he wanted to search the house.

Q You are telling the Court, under oath here, from the time you arrived at the driveway to the time the cocaine was found in your house, that he never discussed him or other law enforcement personnel your house?

A No, sir.

Q Never? That never came up?

A No, sir.

THE COURT: Okay. That what he says.

BY MR. R. PEREZ:

Q Did he ask you for your permission to search your logic?

A I never understood that he wanted to make a search. (Suppress Hearing 2R 35, lines 6-21)

THE COURT: Did the officer ever ask you at any time permission to search your house, ever?

THE WITNESS: No, sir.

THE COURT: Did you understand that, by signing that document, you would be giving permission to search the house?

THE WITNESS: No, sir. (Suppress Hearing 2R 37, lines 13-18)

The trial court concluded in its findings of facts that Innocencio **read** and signed a written consent form to search his residence located at 5816 Mavis Lane, Pasadena, Texas. (Pet.App. 37 at pgh. 23; and 43 at pgh. 44). However, in its legal conclusions the trial court concluded that Innocencio **did not read** the consent form and for that reason the written form did not invalidate the consent. (Pet.App. 52 at pgh. 33). The trial court's legal conclusion is in conflict with its finding of fact and with the evidence as hereinbelow noted, and this is an incorrect view of law predicated on the court's mistake and illogical conclusion. Viewing the evidence in the light most favorable **to the over all picture from the fact finder**, the court of appeals rejected that trial court's findings that Innocencio read the form.

The trial court's findings of fact that Innocencio **read** and signed a written consent form is amply supported by the evidence. Innocencio testified on direct that he read at least parts of the form and that he signed it:

Q Did you read this document?

A No, sir.

Q Did you read any parts of the document?

THE COURT: Excuse me. He said no. He said he didn't read the document.

BY MR. R. PEREZ:

Q Well, you have your initials on this part (indicating)?

A Yes, sir.

Q Do you know why you put your initials there?

A Because the officer made a mistake. He wrote "Houston" instead of "Pasadena".

Q Did you see this place where your name was, Jorge Alberto Inocencio, and you driver's license?

A Yes, sir.

Q Did you read that?

A Well, I saw my name there.

Q Okay, and what did you understand was going to happen to you when you signed this document?

A Well, they was only to ask me questions.

Q And how did you determine that?

A Because there where--my name is right above. It says "person," and that's what I understood.

Q Is that what Officer Bell had told you, that you were going to be questioned if you signed it?

A Yes, sir.

Q Have you ever heard the English word `premises'? The English word.

A No, sir.

Q Have you ever heard the Spanish word premisas, P-R-E-M-I-S-A-S?

A No, sir.

Q Well, are you saying to us that you don't know the meaning of either word, sir?

A No, sir.

Q Do you know the meaning of either word?

A No, sir. I don't know the meaning. (Suppress Hearing 2R 15, line 6 -- 16, line 16)

The trial court concluded that Innocencio did not read the form based on his answer, that he had not read the (whole) form. Innocencio's counsel attempted to adduce if Innocencio had read parts of the forms but was stopped by the Court. However, Innocencio's subsequent testimony on direct indicated that he read parts of the form. The evidence supports that Innocencio did read at least parts of the form because additionally, the government in its cross of Innocencio elicited from him what parts of the form he had read:

Q Government's Exhibit No. 2. Where it says "nombre," n-o-m-b-r-e, that's your signature, right, sir?

A Yes, sir.

Q Officer Bell certainly didn't threaten you to sign this, right?

A Well, he put it in front of me, for me to sign it.

Q Put a gun to you at the time you signed it?

THE COURT: No. He said there was no gun ever drawn. Come on.

BY MR. R. PEREZ

Q Now, this is your initial right here, right?

A Yes, sir.

Q Si? Did he allow you to initial this when you said he made a mistake, where it says "Houston" and he wrote in "Pasadena"?

A Well, he ordered me to place my initials there.

Q But you knew enough that, when it was 5816 Mavis Lane, you knew that was your address, right?

A Yes, sir. (Suppress Hearing 2R 31, lines 2-21)

Q The only part that you read was your name, Jorge Garza Inocencio, and this number next to your name?

A No. This part here (indicating).

Q What part?

A Where it says, "persons, premises or transports to be examined."

THE COURT: All right. Wait a second.

In your examination by your lawyer, you said you didn't read any of that.

MR. E. PEREZ: Your honor, may I--

THE COURT: No sir. I'm asking the questions. Is that correct?

THE WITNESS: The part above, I didn't read it, Your Honor.

THE COURT: all right. Now, you question, sir?

MR. E. PEREZ: Your Honor, I was objecting to a translation from the court interpreter.

The defendant said premisas, and the translator translated it to premises. I would ask that the court take note that the word "premises," as translated from premisas, means premise as in logic, but not locale or site.

THE COURT: I heard the testimony by the expert witnesses, and I will consider that. Thank you.

MR. E. PEREZ: Thank you, Your Honor.

THE INTERPRETER: Your Honor, I want you to point out also, Your Honor, that there is no other word for me to translate into English but "premises."

MR. E. PEREZ: Your Honor. He could say localidad, or "place," locale, sitio. There is a number of other translations for the word.

THE INTERPRETER: I didn't use the word in Spanish, sir. He used--

MR. E. PEREZ: He's translated "premisas" from Spanish to English, so the only translation can be "premises." But the meaning, your honor, is what I'm objecting to. It means--it does not mean locale.

THE COURT: I understand. I will consider the testimony by the professor in making a decision. (Suppress Hearing 2R 33, lines 16 -- 35, line 3)

REASONS FOR REVIEW

The Court should grant review on this petition for writ of certiorari since the U.S. court of appeals **not only has decided** an important question of federal law that has not been, but should be, settled by this Court, **but also has decided** an important question in a way that conflicts with relevant decisions of this Court.

ARGUMENT

The court of appeals reversibly erred. The totality of the circumstances do not support the trial court's factual and legal conclusions. The written consent form signed by Innocencio without question granted the officers consent to only question Innocencio and not to conduct a search of his house. Further, the overwhelming evidence does not support the trial court's conclusion that Innocencio granted oral consent to a search of his residence, not only because the alleged oral consent was granted contemporaneously with the ineffective written consent to search, but also because the testimony of the government's witness was vague and indefinite, when compared to Innocencio's, as to whether Innocencio **specifically** and **unequivocally** granted such oral consent when considered in light of the fact that consent is not to be lightly inferred and the burden of proof is on the government. Because the trial court's factual findings are not amply supported by the record and clearly against the weight of the evidence, this reviewing court, when considering the totality of the evidence and circumstances, must be left with a definite and firm conviction that a mistake has been made, and reject the trial court's "clearly erroneous" factual and legal maneuvering utilized to overrule Innocencio's motion to suppress.

Because the evidence supports that Innocencio read that part of the written consent form which indicated that he was to be examined at his residence together with the proximity of the oral and written requests supports Innocencio's

contention that he clearly understood Officer Bell to be requesting consent to examine him. The government failed to meet its burden.

At the suppression hearing, the government's agent, Officer Ted Bell, testified that both oral and written consent was given by Innocencio (Suppress Hearing 1R 139, lines 2-7; 166, line 4) but admitted that **the search was conducted relying solely on the signing of the written consent form and that had Innocencio not signed they would not have conducted the search.** (Suppress Hearing 1R 155, lines 7-12; 167, lines 7-17).

The court of appeals erred in sustaining the validity of the search of Innocencio's residence. Because the government relied on an written consent that merely authorized the questioning of Innocencio at his home and was not effective as consent to search, the government cannot now seek to validate the consent based on an alleged oral consent. Further, because the consent form referred to his being "examined" (questioned) at his residence, the courts below erred in its factual determination that Innocencio never read the consent to form and that he could not have mistakenly relied on it translation.

The court of appeals also erred in shifting the burden to Innocencio to prove that the alleged oral consent was involuntary. It is the government's burden to prove that consent to search is voluntary. Because there is overwhelming evidence tends to support Innocencio's contention he never understood he was giving consent to a search of his residence, the court of appeals, by not requiring that the government provide a clear and complete record on the issue, in effect shifted the burden to Innocencio. Alternatively, if the burden was not shifted to Innocencio, the government's burden was lessened due to the fact that the government's burden was allowed to be met with just the conclusive testimony of an officer that oral consent was given and no other supporting factual evidence. The

overwhelming record evidence, which was totally ignored by the court of appeals, was that Innocencio understood that he was consenting to be questioned at his home. In fact that same officer testified that "it appeared" that Innocencio understood him. The court of appeals ignored the law which requires the government prove more than "it appeared" Innocencio understood.

A. Alleged oral consent unavailable to justify search conducted on the basis of an invalid written consent.

The court of appeals decision to uphold the search on the basis of an alleged oral consent is in conflict with the holding in Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). There the Court, through Mr. Justice White, stated:

> when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. 391 U.S. at 548-550; 88 S.Ct. at 1792.

Innocencio submits that because the government's clear and uncontroverted testimony was that the search would not have been conducted unless Innocencio signed the written consent, that as in Bumper, supra, the courts below cannot justify the government's search on the basis of oral consent once it turned out that the written consent relied upon was invalid.

B. Innocencio read parts of written consent form

Contrary to the review standards of Ornelas v. U.S., 116 S.Ct. 1657, 1663 (1996), the court of appeals erroneously factually concluded that Innocencio did not read any part of

the consent form, and could not have relied on its translation causes the focus to shift strictly on whether oral consent to search was given by Innocencio (Pet.App. 8). Because the written consent form is insufficient to grant consent, Innocencio submits the issue is indeed whether oral consent to search was given.

The trial court concluded in its findings of facts and conclusions of law that **Innocencio read and signed a written consent form** to search his residence located at 5816 Mavis Lane, Pasadena, Texas. (Pet.App. 37 at pgh. 23; 43 at pgh. 44). However, in its legal conclusions the trial court concluded that the written form did not invalidate the consent since **Innocencio did not read the consent form**. (Pet.App. 52 at pgh. 33).

However, the trial court's legal conclusion is in conflict with its finding of fact and with the evidence (which was that Innocencio did not read the written consent form) as hereinbelow noted. Ignoring the finding of fact and the overwhelming evidence at the suppression hearing that Innocencio read parts of the written consent form (Suppress Hearing 2R 15, line 6--16, line 16; 31, lines 11-21; 33, lines 15-21; 38, lines 7-12; 39, lines 4-6) leads to an incorrect legal conclusion predicated on the court's mistake and illogical factual conclusion.

The court of appeals also concludes (Pet.App. 7) that Innocencio testified that he did not read the form and that because he never read the form could not have mistakenly relied on its translation.

Innocencio's answer that he did not read the document (form) was a correct response to a global question as to whether he had read the whole document. Innocencio's attorney then questioned Innocencio as to whether he had read parts of the document. An answer was not allowed by the trial court. This Court has taken Innocencio's answer, that he did not read the whole document out of context. His

testimony is clear on his reading part of the written consent form.

Innocencio submits that because the evidence supports the fact that he read the part of the consent form which indicated that he was consenting to being "examined" (questioned) at his residence, then the issue of whether he clearly and unequivocally understood that he gave oral consent to search must be weighed based (contrary to the court of appeals conclusion), on his reliance and understanding of the written consent form.

The trial court further reached a factual and legal conclusion that Innocencio's act of signing the consent form signified that he intended to memorialize what he had previously agreed to when he allegedly consented verbally to the search of his residence. (Pet.App. 52 at pgh. 33). North Carolina v. Butler, 441 U.S. 369, 374, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979), stands for the proposition that a prosecutor relying upon consent "has the burden of proving that the consent was, in fact, freely and voluntarily given" and that "an express written or oral statement of waiver of right ... is usually strong proof of the validity of that waiver". In Innocencio's case because the written consent as relied upon and understood by Innocencio was a consent that he be examined at his residence, it must stand as strong proof that he was also verbally granting consent to be questioned and not to search his residence. How then, Innocencio submits, can the fact that the written consent he signed was ineffective to give (written) consent to search his residence then be utilized by the trial court as "memorializing" the alleged oral consent. The converse is true. If it memorialized anything it was what Innocencio has always maintained, which is that the oral consent given by him was the same as the written, and authorized only that he be "examined" and not that his residence be searched. The conclusions of the courts' below are illogical and not supported by the evidence or law requiring that consent to search not be lightly inferred. Phelper v. Decker, 401 F.2d 232, 236 (CA5 1968).

The courts below cannot infer that oral consent to search was granted from an ineffective written consent form. Innocencio submits the ineffective written consent form supports the fact he only gave oral consent to be questioned and thus the government failed to meet its burden.

The courts below in their findings of facts committed "clear error" and abused discretion because such findings were not supported by a preponderance of the evidence, and as such this Court, upon reviewing the entire evidence should be left with a definite and firm conviction that a mistake has been made because Innocencio read that part of the consent form indicating he was to be examined at his home. See U.S. v. Williams, 69 F.3d 27, 28 (CA5 1995).

In fact, it was the government's contention, throughout the course of the case in its documents filed in this cause, that **Innocencio read the consent form**. (Record on Appeal Tab 80, U.S. Supplemental Response to Motion to Suppress, p. 9; Record on Appeal Tab 91, Govt's Proposed Findings of Fact and Conclusions of Law, p. 9; Record on Appeal Tab 97, Govt's Amended Proposed Findings of Fact and Conclusions of Law, p. 9; and, Record on Appeal Tab 114, Govt's Trial Memorandum, p. 9).

Although Innocencio agrees with the trial court's findings of fact that he read (at least parts of) the consent form, he does not agree with its contradictory legal conclusion that Innocencio did not read or that the consent from authorized a search of his residence. Innocencio submits that the overwhelming evidence, being the form itself and Innocencio's testimony of what he understood the form to mean, coupled with the expert's testimony, conclusively proved that the written consent form signed by him could not under any circumstances be considered as a consent to search his residence.

Innocencio submits that ineffective was the written consent form signed by him, which was the government's sole reliance for conducting the search of his home. Primarily the consent form was defective in its translation. The trial court made a factual determination, which was supported by the expert testimony, that the Spanish language version of the written waiver form signed by Innocencio translates the English word "premises" into the Spanish word "premisas", and that in Spanish this word means premises in the sense of logical proposition, not having the meaning of residence or location. (Pet.App. 37 at pgh. 24) Further, Innocencio's uncontroverted language expert's testimony was that the Spanish word "examinar" does not suggest a search. (Suppress Hearing 1R 229, lines 2-5)

For this reasons alone the consent form could never have been used as evidence to support "consent" to search a home, building, residence, local, site, etc., without first interlineating the form with a correct Spanish word translation which was not done in the present case.

Secondly, and perhaps more importantly, even if the Spanish word "premisas" could in any way or fashion be given a meaning to suggest a residence, house, building; etc.; or if the consent form had had a correct word interlineated, it would still nonetheless be insufficient evidence to support "consent" (to search a residence) because the blank in the form which had to be filled with the name, address or description of the persons, place or vehicle to be "searched", contained the name of Innocencio and his Texas Driver's License number as the person to be "examined" and had no address or description of any vehicle to be searched or "examined." The language expert testified that the form signed by Innocencio authorized only that Innocencio be "examined" and not that any "premisas" be "examined":

> Q In the English version, which is Exhibit No. 3, Where it says person, premises or conveyance to be searched. It's blank underneath there, right?

A On the English version?

Q Yes. There is blanks underneath there?

* * * * *

A The name Jorge Garza Inocencio and a Texas driver's license number.

Q So the form would authorize that Jorge Garza Inocencio be examined?

A That's right.

Q His persona ser examinado, Jorge Garza Inocencio?

A Right.

Q Premisas ser examinado. Any premisas to be examined?

A Well--

Q In these blanks? Corresponding blanks?

A There is nothing in the blanks other than the name of Jorge Garza Inocencio and a Texas driver's license number. (Suppress Hearing 1R 227, line 1 -- 228, line 2)

Innocencio testified that he read that part interpreted by the expert, (Suppress Hearing 2R 33-35) and that he understood the signing of the form not as granting consent to search the house but only as agreeing to be asked questions. (Suppression Hearing 2R 37, lines 16-18; 14, line 25 -- 15, line 5) A thorough reading of the language expert's testimony corresponds with Innocencio's testimony indicating that his understanding of the written consent form was that he would be "examined" at his residence.

Comparing the consent forms signed by Innocencio, introduced as government's exhibit number 2, to those signed by Tovar and Elizondo, clearly supports Innocencio's contention that he thought he was consenting to be examined/questioned. The consent form signed by Innocencio, which was also filled out on the Spanish side version, undoubtedly can only indicate that Jorge Garza Inocencio, TDL 09669885 was the person to be "examined" and that said "examination" would take place at 5816 Mavis Lane, Pasadena, Texas. (Record Excerpt, Tab 5).

C. Innocencio's oral consent only allowed his questioning and did not authorize a search of his residence.

Officer Ted Bell testified Innocencio gave oral consent:

A ... and I asked him if I could have permission to conduct a search of his residence to see if there was any illegal contraband, and he said yes.

Q Did you then ask him for written permission to search his residence?

A Yes, I did. (Suppress Hearing 1R 139, lines 2-7)

On cross Officer Ted Bell testified as follows:

Q Okay. What did you tell him you were going--when you asked him in spanish for verbal consent, how did you ask him.

A (In Spanish) With your permission, allow us to make a search in your house.

Q Do you know whether he understood that or not?

A He appeared to. (Suppress Hearing 1R 166, lines 12-17)

The clear meaning of Officer Ted Bell's testimony regarding for oral consent is that he did not request of Innocencio for permission to search the house, but affirmatively stated that they would make a search in Innocencio's home. As to whether Innocencio's alleged oral consent was specific and unequivocal and his understanding, Officer Bell's testimony was merely that "he appeared to". Innocencio submits that the court's determination that he granted oral consent was clearly erroneous in that the aforestated evidence does not prove by a preponderance of the evidence that he understood that he was giving such consent.

When the tentative testimony of Officer Bell on whether Innocencio understood that he was giving consent to a search of his house, is compared to the specific testimony of Innocencio, **the clearly erroneous factual finding is evident**. This is even more evidence when you consider that the alleged granting of the oral consent was contemporaneous with the signing of the written form which as clearly noted hereinabove was effective only to grant consent to examine Innocencio and not to search his residence.

D. The courts below required Innocencio to prove the alleged oral consent was involuntary.

The voluntariness of consent to search, which may not be lightly inferred, is a question of fact to be determined from the totality of circumstances. U.S. v. Cooper, 43 F.3d 140, 144 (CA5 1995); Phelper v. Decker, 401 F.2d. 232, 236 (CA5 1968). The government has the burden of proving by a preponderance of evidence that consent to search was voluntary. Cooper, supra, at 144.

The court of appeals, by simply accepting, (on the basis of the record and totality of circumstances), the testimony of an officer, with nothing more, "lightly inferred" consent and in effect shifted the burden to Innocencio to prove that he did not give consent. The record is not clear on what Spanish

word Officer Bell used to translate the word "search". Because the record indicates Innocencio understood he only gave consent to be questioned at his home, the government failed to meet its burden.

The record does not reflect which Spanish word by Officer Bell used for "search." By accepting that Innocencio understood Officer Bell, the courts below shifted to Innocencio the burden of making a complete record.

The evidence of oral consent from Officer Ted Bell is set out above at page 21.

To allow the alleged oral consent on such skimpy evidence without proof on the record of what words Officer Bell used for the term "search" in effect shifts to burden to Innocencio to not only provide a complete clear record but also to prove that he did not give consent.

E. Government's burden to prove consent lightened.

The clear meaning of Officer Ted Bell's testimony regarding the request for oral consent is that he did not request of Innocencio for permission to search the house, but affirmatively stated that they would make a "search" in Innocencio's home. Because Officer Bell indicated that he wanted to make a "search" in your home, and there is no indication what Spanish word Officer Bell used for the term "search", the government failed to meet it's burden of proving that Innocencio gave oral consent and disapprove that what Innocencio understood was that "they was only to ask some questions."

Further, as to whether Innocencio's alleged oral consent was specific and unequivocal and his understanding of Officer Bell, Bell's testimony was merely that "he appeared to". Innocencio submits that the court's determination that he granted oral consent to search his residence was clearly erroneous in that the aforestated evidence does not prove by

a preponderance of the evidence that he understood that he was giving such consent.

The record is supports Innocencio's contention he understood Officer Bell orally requesting permission to question him at his home. This courts below ignored that evidence. From the beginning, Officer Bell informed Innocencio he was interested in questioning him. (See above at p. 21; Suppress Hearing 1R 137, line 21 -- 137, line 4)

Innocencio often testified of understanding Officer Bell to be **requesting consent to question** him inside the house on the investigation, **but not for consent to search the house**:

> Q After you felt you were arrested by this officer, did you have an occasion to speak with an officer who testified the last time we were here, on Friday? Officer Ted Bell?
>
> A Yes, sir.
>
> Q Was that conversation in English or in Spanish?
>
> A In Spanish.
>
> Q Did you understand the conversations you were having with him?
>
> A Yes, he told me that he was going to ask me some questions. (Suppress Hearing 2R 11, line 10)
>
> Q During the questioning by Officer Bell, did he at any time request for your permission to search your house?
>
> A No, sir.

Q Did you ever understand him to want to search your house?

A No, sir.

Q Did you understand everything he was telling you?

A Well, some of the things.

Q What do you mean, some of the things?

A Well, because he doesn't speak very good English.

Q English?

A I mean Spanish. (Suppress Hearing 2R 12, line 20 -- 13, line 5)

Q Now when you signed this instrument, did you think you were giving consent to search your house?

A No, sir.

Q What is it that you thought you were acquiescing to?

A Only that they were investigating my person, asking me questions. (Suppress Hearing 2R 14, line 25 -- 15, line 5)

Q Okay. And what did you understand was going to happen to you when you signed this document?

A Well, they was only to ask me questions.

Q And how did you determine that?

A Because there were--my name is right above. It says "person," and that's what I understood.

Q Is that what Officer Bell had told you, that you were going to be questioned if you signed it?

A Yes, sir. (Suppress Hearing 2R 15, line 22 -- 16, line 5)

THE COURT: What is the word you would use for "search"?

WITNESS: Catear.

THE COURT: How do you spell it?

INTERPRETER: C-A-T-E-A-R.

THE COURT: Okay. Go on.

BY MR. PEREZ:

Q Were those words ever used by Officer Ted Bell?

A No, sir. (Suppress Hearing 2R 17, lines 10-19)

Q And up until that point, you and he were communicating pretty well in Spanish, right?

A Yes, we were having a conversation in Spanish.

Q You understood what he told you, and you felt that he understood what you were telling him, right?

A Well, many words I did not understand. (Suppress Hearing 2R 28, lines 19-24)

Q Sir, isn't it true that the whole gist of you and Officer Bell's conversation in the driveway and inside your house, before the cocaine was found, was whether Officer Bell could search your house?

A No. He never told me that he wanted to search the house.

Q You are telling the court, under oath here, from the time you arrived at the driveway to the time the cocaine was found in your house, that he never discussed him or other law enforcement personnel your house?

A No, sir.

Q Never? That never came up?

A No, Sir.

THE COURT: Okay. That what he says.

BY MR. R. PEREZ:

Q Did he ask you for your permission to search your logic?

A I never understood that he wanted to make a search. (Suppress Hearing 2R 35, lines 6-21)

THE COURT: Did the officer ever ask you at any time permission to search your house, ever?

THE WITNESS: No, sir.

THE COURT: Did you understand that, by signing that document, you would be giving permission to search the house?

THE WITNESS: No, sir. (Suppress Hearing 2R 37, lines 13-18)

The clearly erroneous factual findings are evident upon comparing the tentative ("he appeared to") testimony of Officer Bell on whether Innocencio read and understood that

he was giving oral and written consent to a search of his house, to the specific testimony of Innocencio. This is even more evident when one considers that the alleged granting of the oral consent was contemporaneous with the signing of the written form which as clearly noted hereinabove was effective only to grant consent to examine Innocencio and not to search his residence. To judicially find Innocencio orally consented to the home search on such skimpy evidence lessens the government's burden of proof so low as to require Innocencio to prove the oral consent was involuntary.

CONCLUSION

The totality of the circumstances do not support the trial court's factual and legal conclusions. The written consent form signed by Innocencio without question granted the officers consent to only question Innocencio and not to conduct a search of his house. Further, the overwhelming evidence does not support the trial court's conclusion that Innocencio granted oral consent to a search of his residence, not only because the alleged oral consent was granted contemporaneously with the ineffective written consent to search, but also because the testimony of the government's witness was vague and indefinite, when compared to Innocencio's, as to whether Innocencio **specifically** and **unequivocally** granted such oral consent when considered in light of the fact that consent is not to be lightly inferred and the burden of proof is on the government. Because the trial court's factual findings are not amply supported by the record and clearly against the weight of the evidence, this reviewing court, when considering the totality of the evidence and circumstances, must be left with a definite and firm conviction that a mistake has been made, and reject the trial court's "clearly erroneous" factual and legal maneuvering utilized to overrule Innocencio's Motion to Suppress.

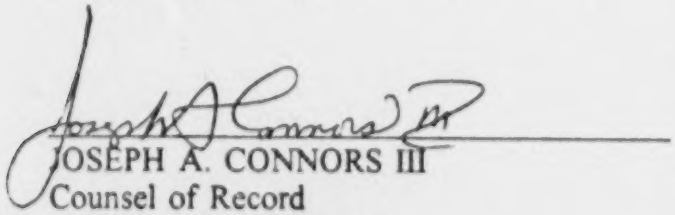
By affirming the district court, the court of appeals erroneously concluded that the search of Innocencio's residence was done in reliance of an alleged oral consent and

not on the invalid written consent. The evidence is overwhelmingly contrary to the court of appeals' erroneous factual conclusion that Innocencio did not read the written consent form and thus could not have mistakenly relied upon it. Error was also committed by the court of appeals' **shifting of burden to Innocencio** to supply a complete and clear record on what Spanish word was used by Officer Bell to translate the word "search," **and to disprove the voluntariness of the alleged oral consent**. Alternatively, if the burden was not shifted to Innocencio, the court of appeals illegally lessened the government's burden by "lightly inferring" oral consent in light of the skimpy relevant evidence.

The petition for a writ of certiorari should be granted.

Date: Signed on November 20, 1997

Respectfully submitted by
Petitioner's attorney,



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